



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.: 201209-0334]

RIN 0648-BK05

Fisheries of the Northeastern United States; Omnibus Framework Adjustment to Modify the Mid-Atlantic Fishery Management Council's Risk Policy

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS approves and implements changes to the Mid-Atlantic Fishery Management Council's Risk Policy. This action is intended to adjust the Council's risk policy by accepting a higher level of risk for stocks at or above biomass targets. These adjustments could lead to increases in catch limits for healthy fisheries managed by the Council.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The Mid-Atlantic Fishery Management Council developed an environmental assessment (EA) for this action that describes and analyzes these measures and other considered alternatives. Copies of the Risk Policy Omnibus Framework Adjustment, including the EA and information on the economic impacts of this rulemaking, are available upon request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. These documents are also accessible via the Internet at <http://www.mafmc.org>.

Copies of the small entity compliance guide are available from Michael Pentony, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic

Drive, Gloucester, MA 01930-2298, or available on the internet at:

<http://www.greateratlantic.fisheries.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Management Specialist, 978-282-8456.

SUPPLEMENTARY INFORMATION:

Background

The Council took final action on this Risk Policy Omnibus Framework Adjustment to modify its risk policy in December 2019 and submitted the action to NMFS in early August 2020. NMFS published a proposed rule for the Framework on November 12, 2020 (85 FR 72312). In the interest of implementing a final rule before January 1, 2021 to facilitate the development of 2021 fishing year specifications, the proposed rule included a 15-day public comment period that closed on November 26, 2020.

NMFS has approved all of the measures in the Framework recommended by the Council, as described below. This final rule implements changes to the Council's risk policy and removes the typical/atypical species designation. The Magnuson-Stevens Fishery Conservation and Management Act allows NMFS to approve, partially approve, or disapprove measures proposed by the Council based on whether the measures are consistent with the FMP, the Magnuson-Stevens Act and its National Standards, and other applicable law. Details concerning the development of these measures were contained in the preamble of the proposed rule and are not repeated here.

This action adjusts the Council's risk policy by accepting a higher level of risk (*i.e.*, the probability of overfishing, known as P^*) for stocks that are healthy and either at or above biomass targets. For stocks not subject to a rebuilding plan that have a ratio of biomass (B) to biomass at maximum sustainable yield (B_{MSY}) of 1.0 or lower, the maximum P^* as informed by the overfishing limit (OFL) distribution will decrease linearly from a maximum value of 45 percent until the P^* becomes zero at a B/B_{MSY} ratio of 0.10. For stocks with biomass that

exceeds B_{MSY} and the B/B_{MSY} ratio is greater than 1.0, the P^* will increase linearly from 45 percent to a maximum of 49 percent when the B/B_{MSY} ratio is equal to 1.5 or greater. Under the current risk policy, the maximum allowed P^* is capped at 40 percent for stocks with a B/B_{MSY} ratio of 1.0 or higher, with this probability decreasing linearly until P^* becomes zero at the B/B_{MSY} ratio of 0.10. The Council made no adjustments for stocks under a rebuilding plan or stocks with no OFL or proxy OFL. The increased tolerance of risk could lead to increases in ABC allocations for healthy fisheries the Council manages. The Council and its Scientific and Statistical Committee used this modified risk policy in recommending ABCs for scup and black sea bass for the 2021 fishing year that begins on January 1, 2021.

This action also removes the typical/atypical species designation when applied to the current risk policy. This designation was intended to provide for less risk to those species whose life histories make them more vulnerable to over-exploitation; however, it has rarely been used and is currently only applied to ocean quahog. This allows the Council to better use improvements in stock assessment and modeling approaches that can more appropriately account for and address such vulnerability.

Proposed Rule Comments and Responses

We received seven relevant and two non-relevant comments on the proposed rule during the public comment period. Below is a summary of the relevant comments and our responses.

Comment 1: NMFS received two comments in agreement with the action. The Virginia Marine Resources Commission noted no objections to the changes in the Council's risk policy. A member of the public commented in agreement with these adjustments, noting it was a welcomed change and enabled better management and sustainability. Specifically, it enables better utilization of species that are flourishing while still limiting the harvest of those fisheries that cannot sustain increases in allocations.

Response: NMFS agrees.

Comment 2: One commenter supported removing the typical/atypical species designation. The commenter also suggested that NMFS conduct an in-depth analysis of the regulatory changes to fully consider all impacts, including any increased risk to the environment and fish stocks as well as economic impacts. The commenter also noted that, under Executive Order (E.O.) 12866, the net benefits of these regulatory changes must outweigh the net costs.

Response: NMFS agrees with removing the species designation. The Council's EA provides the analysis suggested by the commenter. In the EA, economic impacts are analyzed, along with a comprehensive analysis of impacts to the affected environment that includes managed and non-target species, physical environment, protected species, and effects on human communities. The alternatives considered in this action do not modify existing commercial quotas or recreational harvest limits for Council-managed fisheries and, therefore, will not have any direct socioeconomic impacts. However, increases in ABC allocations through future actions as a result of this action could result in positive socioeconomic impacts. When the proposed action is considered in conjunction with all other impacts from past, present, and reasonably foreseeable future actions, it is not expected to result in any significant impacts, positive or negative; therefore, no significant cumulative effects on the human environment are associated with the proposed action. Based on these findings, the outcome of the EA analysis was a Finding of No Significant Impact of implementing the regulatory changes as recommended by the Council. In addition, as suggested by the regulatory impact analysis in the EA, this rule was determined to be not significant under E.O. 12866.

Comment 3: One member of the public asked NMFS to clarify what is meant by species whose life histories make them more vulnerable to over-exploitation.

Response: Over-exploitation occurs when a species is harvested in larger quantities than what is sustainable. Certain species characteristics, such as low reproduction rates and long timeframes to recruit to harvestable size for the fishery, could make it more difficult for the stock to recover to sustainable biomass levels), thus making the species more vulnerable to over-

exploitation. While this rule removes the atypical designation for these species, any future rulemakings would still consider these factors when putting measures in place.

Comment 4: Three members of the public opposed the rule due to reasons that included overfishing concerns, lack of studies on long-term impacts to support increasing risk probabilities, concern with loosening or eliminating policies meant to protect and conserve natural resources, and ocean temperature shifts/changes.

Response: NMFS appreciates the stated concerns that members of the public have with this rule. The changes to the Council's risk policy only apply to fisheries that are healthy and are at or above sustainable levels (i.e., are not overfished and overfishing is not occurring). An example of a stock where increased risk may be applied is the black sea bass fishery, which in recent years has been at double or close to double the biomass at maximum sustainable yield. In addition, NMFS continuously conducts biomass surveys and stock assessments to gauge the health of managed fisheries. These biomass surveys also collect other environmental data, such as ocean temperature, which help NMFS evaluate any changes within the stock, for example biomass increases/decreases and changes in stock structure such as shifting locations. The changes to the risk policy implemented in this action are administrative in nature and merely allow fishery managers and scientists to consider taking increased risks when setting ABC allocations. It is also important to note that, while this action allows for increased risk from the current policy, the revised policy still ensures that there would be less than a 50 percent chance of overfishing. Any ABC recommendations will be made through future rulemakings, which will include a comprehensive analysis of any proposed measures.

Changes from the Proposed Rule

There are no changes to the measures from the proposed rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act and other applicable law.

This final rule has been determined to be not significant for purposes of E.O. 12866.

This final rule is considered to be an E.O. 13771 deregulatory action.

This final rule does not contain policies with federalism or “takings” implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

This action does not contain any collection-of-information requirements subject to the Paperwork Reduction Act.

The Assistant Administrator for Fisheries has determined that, because this rule relieves a restriction by allowing the Council to increase ABC allocations for the healthy fisheries it manages, it is not subject to the 30-day delayed effectiveness provision of the Administrative Procedure Act pursuant to 5 U.S.C. 553(d)(1). In addition, the need to implement these measures in a timely manner constitutes good cause under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date. The Council and its SSC used this modified risk policy in recommending ABCs for scup and black sea bass for the 2021 fishing year specifications package for summer flounder, scup, and black sea bass. The scup, black sea bass, and summer flounder fisheries operate on the calendar year. Annual publication of the summer flounder quotas prior to the start of the fishing year, by December 31, is required by Court Order in *North Carolina Fisheries Association v. Daley*. If this risk policy rule were not effective prior to the start of the fishing year, this could delay the 2021 summer flounder, scup, and black sea bass specifications, requiring interim specifications for these species to go into effect on January 1. This scenario would create unnecessary challenges for individual states when setting commercial possession and/or trip limits, which apportion the catch over the entire calendar year. This would cause unnecessary harm to the fisheries and is contrary to the public interest.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: December 10, 2020.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.21, revise paragraphs (b)(1) and (2), and (c)(1) to read as follows:

§ 648.21 Mid-Atlantic Fishery Management Council risk policy.

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(b) * * * (1) For stocks with a ratio of biomass (B) to biomass at MSY (B_{MSY}) of 1.0 or lower, the maximum probability of overfishing as informed by the OFL distribution shall decrease linearly from a maximum value of 45 percent until the probability of overfishing becomes zero at a B/B_{MSY} ratio of 0.10.

(2) For stocks with biomass that exceeds B_{MSY} and the B/B_{MSY} ratio is greater than 1.0, the probability of overfishing shall increase linearly from a probability of overfishing of 45 percent to a maximum probability of overfishing of 49 percent when the B/B_{MSY} ratio is equal to 1.5 or greater.

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(c) * * * (1) Unless otherwise allowed in paragraph (c)(2) of this section, for instances in which the application of the risk policy approaches in paragraph (b) of this section using OFL distribution results in a more restrictive ABC recommendation than the calculation of ABC derived from the use of $F_{REBUILD}$ at the MAFMC-specified overfishing risk level as outlined in paragraph (a) of this section, the SSC shall recommend to the MAFMC the lower of the ABC values.

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